III.

UNIFORM MARRIAGE AND DIVORCE LAWS.

THE inconveniences, perhaps perils, of discordant State laws on marriage and divorce have been much discussed of late. The remedy usually proposed is to amend the Federal Constitution and give Congress power to make uniform laws. Without underrating any evils of the present disorder, I differ as to the remedy and desire here to state my reasons for dissent.

"As far as I can see, the American Constitution is the most wonderful work ever struck off at one time by the brain and purpose of man." So says England's greatest statesman, and so say we all of us. The so-called Constitution, under which he and Lord Salisbury play see-saw in governing England, can be changed any day by mere legislative act. It is one excellence of ours that it cannot. It was amended soon after its adoption to meet objections by certain States, and to simplify the choice of President, but never since, except to formulate the results of the war. It has stood for a century the most stable, yet elastic, the most conservative, yet liberal, scheme of government ever devised. Its keystone is the adjustment of State and Federal functions. Any change in that adjustment is a risk; readiness to resort to change is a grave peril; and that peril is increased by the insidiousness of words, for to the unthinking mass, amendment means improvement and is favored as such.

There are other dangers which threaten us besides loose divorce laws. One of them is that our Anglo-Saxon respect for law and American faith in definite constitutions may be worn out by hasty legislation and restless meddling with organic law. There is a growing habit of thinking our whole duty done towards remedying a wrong, when we have written articles, held meetings, and got a law passed against it. Soon, in surprised disgust that the law does not enforce itself, we pass another and amend and re-amend, till we have a tangled web of incoherence and contradictions, through whose meshes he must be a dull lawyer who cannot drag the worst offender. Then our law goes into the crowded grave of dead letter statutes, and, in despair, we call on Hercules for help, and want to amend our constitution, instead of fairly using our own resources.

Hesitating as I do at any change which would reverse the policy of the Founders, unless justified, like the surgeon's knife, by urgent need, I further object to the one now proposed, that it is in the wrong direction. They who admire paternal government, or despotism under any other plausible name, may well favor the project as a long step towards centralization, for if Congress is given control of marriage and divorce it is hard to say what shall be refused.

Judge Bennett has recently given to the public an able argument for Federal interference, which seems based on this proposition. "The reasons for desiring relief from an unfortunate marriage are substantially the same throughout the entire country. . . . The evil is the same, and nature and reason suggest that the remedy, or at least the relief, should be likewise similar. . . . Nothing so much weakens our regard and respect for the law, nothing so much shakes our confidence in any real and abiding distinctions between right and wrong, honor and dishonor, morality and immorality, as the knowledge that what is forbidden by the civil law of one jurisdiction is freely allowed just beyond the border without any penalty whatever." From that beginning, after stating our variant State laws, he goes on to an urgent plea for national legislation as the only remedy.

If this be sound, it would follow that the same remedy should apply to adultery and licentiousness, cognate matters, which are now crimes in Massachusetts and New Jersey, but not in interjacent New York; and why not to liquor selling,

lotteries, larceny, labor troubles, and every other subject on which uniformity is desirable? It might well be argued that a man should not be hung for murder, flogged for thieving, or imprisoned for debt in one State and not in another; should not break the Sabbath, corner pork, take more than six per cent. interest, or do anything else in one place which is forbidden in another, and that the remedy is Federal—no, not Federal, but Imperial—legislation. Could Bismarck himself ask for more?

But we others, who love home rule and dread centralization, what shall reconcile us to the hazard of this change? We would see some clear advantage to be gained before we let a central power govern our marital relations, and, perhaps, in their train, all other domestic, social, and local affairs. Is Congress so successful in dealing with coarser matters that it will adjust wisely these delicate relations? What experience of its methods warrants the belief? Uniform legislation on bankruptcy was intrusted to it. It has passed three acts, repealed them all as failures, and is trying in vain to frame a fourth. Its vacillating follies in finance, currency, and tariff are chronic; its failure with the Mormon problem conspicuous. How can we look to it for wise legislation about family affairs, or even for steady legislation? Property rights may adjust themselves to changing laws, but shifting marriage laws would only make confusion worse confounded.

"Uniform law" is a taking cry, but a bad uniform law is only the worse the wider its extent. What sort of law are we like to have from Congress? We have now nearly as many laws as States, and of theories no end. Of course every one assumes that his own scheme will be adopted, while obviously, all but one must be rejected. Which will it be? Will Congress make marriage a civil contract, provable like other contracts, or require a priest, or magistrate, or what formalities? Shall marriage be free, or must there be publication, license, witnesses, certificates, registry, or what not? And what shall be the consequence to innocent wives and children of some informality? Shall we follow the Bible, the churches of Rome and England, the Presbyterian confession of faith, and a few States in prohibiting marriages of affinity, or most States in permitting them? Shall we let inclination decide, or shall we forbid marriage between races? And shall we draw the line at Negro, Quadroon, Octoroon, Indian, Mexican, Chinese, Japanese, or where?

Shall we follow South Carolina and the Catholic Church in refusing all divorce; New York, in limiting it to a single cause; Arizona in granting it almost at will; or which one of the intermediates? Shall divorcees be the only criminals forbidden to repent and reform, or may they have another chance to be good citizens, and if so, on what terms? There is no general concurrence of views on these and other points, and until we agree, Federal power to make uniform law over the whole nation is premature as well as unsafe.

If we were agreed, we need not amend the Constitution. We might easier attain uniform law by the old and safe method of concerted State action. The obstacle at present is that the country is not ready for concurrence. And that is the best proof that it is not ready for Federal interference.

The fact is, and we may as well face it, uniformity is not at present possible. We are fifty millions, soon to be one hundred; stretched three thousand miles from ocean to ocean; dwelling on sea coast, prairie, and mountain; traders, craftsmen, farmers, miners, and cow boys; of divers nations and races, with divers customs, holding divers religions, more than one of them claiming authority over marriage and divorce. Uniform marriage laws over such widely differing communities would encounter too strong social, moral, and religious prepossessions to be uniformly enforced.

For instance, would any law against mixed marriage stringent enough to satisfy the South be enforceable at the North? Would any limitation of divorce acceptable at the East be tolerated at the West? If no divorced persons could re-marry anywhere in this broad land, would they not mate without marriage? Will communities accustomed to self-government, who now make and insist upon diverse marriage laws suited in their judgment to their diverse conditions, heartily accept uniform laws, or will unlawful unions become common and quasi respectable?

The Presbyterian Church (Conf. of Faith, Ch. 24, Sec. 4) forbids a man to marry any of his wife's kin whom he might not marry if his own—a law broken every day and almost forgotten. If a church cannot compel even its clergy to obey its law against their reasonable inclinations, will Congressional law fare better in unwilling communities? That there will be such communities follows from the plea for National legislation, based on the ground that States never will concur.

It is rudimentary in statesmanship that laws which contravene general sentiment cannot be enforced. Dead letter temperance laws are bad enough, but the peculiar evils of unenforced marriage laws are obviously intolerable.

Judge Bennett's proposition may be bettered thus: "Nothing so much weakens our regard and respect for the law, nothing so much shakes our confidence in any real and abiding distinctions between right and wrong, honor and dishonor, morality and immorality, as unenforceable statutes." This seems to be the truer statement and to reverse his conclusion.

I venture to go further and say that uniform matrimonial laws are not at present desirable.

The nation is in a transition state, not ready to be cast in any rigid mold. We may become homogeneous, but we are not so yet. And we are now passing through some special adjustment of marital relations. Most of us can remember when the family was the unit of society, and when that unit was represented in property, rights, duties, and responsibilities by the man. This is all changed or changing. Marriage in many States is a co-partnership, a quasi business affair, in which neither partner surrenders individuality or estate. Woman is enfranchised, has separate rights, property, and liabilities, invades man's domain, and may soon vote and make laws.

What reactions these changes will produce, and especially in marital relations no one can foretell. The chaos which now exists, and which seems to some so terrible that they would change the Constitution and very basis of Federal union to remedy it, is only a symptom of the disease, not the disease itself. That is the inevitable fever of critical change, to be watchfully tended, not suddenly suppressed. When woman's position is fully settled, when relations and habits have adjusted themselves to the new conditions, we shall be better able to know what laws to make. Till then legislation must be largely experimental, and would best be tried on the smallest scale.

Meanwhile, let us not pull down the walls of our Constitution to bring in this wooden horse, which is like to be as clumsy, useless, and full of danger as its great prototype. At least, let us be first certain that a wooden horse is a good thing to have.

THOMAS M. NORTH.